United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2062.

670

No. 10, SPECIAL CALENDAR.

LOUIS F. ZINKHAM, SUPERINTENDENT OF THE WORK-HOUSE FOR THE DISTRICT OF COLUMBIA,
APPELLANT,

vs.

OTTO LINAWEAVER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED SEPTEMBER 15, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1909.

In the Court of Appeals of the District of Columbia.

No. 2062.

LOUIS F. ZINKHAM, &c., Appellant,
vs.
OTTO LINAWEAVER.

a Supreme Court of the District of Columbia.

No. 488. Habeas Corpus.

In re OTTO LINAWEAVER.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:

1 *Petition for Writ of Habeas Corpus.*

Filed Apr. 27, 1909.

In the Supreme Court of the District of Columbia.

No. 488. Habeas Corpus.

In re OTTO LINAWEAVER.

1st. Your petitioner, Otto Linaweaver, represents that he is a citizen of the United States, a resident of the District of Columbia.

2nd. That he was ordered on or about March 10-1909 to pay his wife, Nellie Linaweaver the sum of Four — ($4.00) per week, by the Juvenile Court of the District of Columbia, and that he has regularly paid said amount since the order of said Juvenile Court went into effect, with the exception of one week, to wit, the week of April 19th, 1909. That his reason for not paying the week of April 19th, was on account of said Linaweaver having lost his position.

3rd. That he, the said Linaweaver went to the Juvenile Court to make arrangements for the extension of time for the paying of said amount; and was thereupon incarcerated and committed to the workhouse without a hearing, on the ground that he was about to abscond from the jurisdiction, which this petitioner denies, and says that he had no intention of leaving said jurisdiction.

4th. That he was required to give a bond if — wished his freedom of $150, conditioned that the surety on said bond should be responsible for the weekly payments and for the petitioner remaining in this jurisdiction.

2 5th. That this petitioner has never declared his intention of leaving said jurisdiction, that no evidence was offered in said Juvenile Court to prove his contemplated departure from the jurisdiction of the District of Columbia.

6th. That the petitioner was not given any time whatsoever to prepare a defense but was arrested and sent to the workhouse the same day.

7th. That the commitment was null and void for the reason that the petitioner was deprived of his liberty without due process of law; that he was not given an opportunity to offer evidence in his behalf to show that he had no intention of leaving the jurisdiction of the District of Columbia. That he was given no time in which to prepare a defense.

8th. That the commitment was null and void for the reason that the proceedings of the Juvenile Court were unconstitutional, and deprived the petitioner of his liberty without due process of law.

The premises considered your petitioner prays That a writ of habeas corpus issue out of this Honorable Court directed to the Superintendent of the Workhouse of the District of Columbia, requiring him to produce in this Court the said petitioner, Otto Linaweaver, and show by what authority and the legality of, the said commitment by which he is detained.

OTTO V. B. LINAWEAVER.

Subscribed and sworn to before me this 26 day of April 1909.
[SEAL.] WM. A. COOMBE,
Notary Public.

W. A. COOMBE,
Att'y for Petitioner.

3 (Endorsed.)

Let the writ issue returnable Friday, April 30", 1909 at 10 o'clock A. M.

HARRY M. CLABAUGH,
Chief Justice.

Return of Louis F. Zinkham, Respondent.

Filed May 3, 1909.

In the Supreme Court of the District of Columbia.

Habeas Corpus. No. 488.

In the Matter of OTTO LINAWEAVER.

Your respondent, Louis F. Zinkham, Superintendent of the Workhouse of the District of Columbia, makes reply to the writ of habeas corpus in the above case heretofore served on him, and says:

That he is the Superintendent of the Washington Asylum and Workhouse of the District of Columbia, and as such has the custody of the body of Otto Linaweaver under and by virtue of a certain warrant of commitment from the Juvenile Court of the District of Columbia, a copy of which is herewith attached and made a part of this answer.

Your respondent has no knowledge of the other matters and things set up in this petition.

Respectfully submitted,

LOUIS F. ZINKHAM,
Superintendent of Washington Asylum and Workhouse, District of Columbia.

Subscribed and sworn to before me this first day of May, A. D. 1909.

[SEAL.] JOHN R. WEYRICH,
Notary Public, D. C.

4 5997.

In the Juvenile Court of the D. C.

To the Superintendent of the Wash'n Asylum, D. C.:

Receive into your custody the body of Otto Linaweaver, herewith sent by the Juvenile Court brought before said Court charged upon the oath of Nellie Linaweaver, with non support of wife and minor child, and being convicted and sentenced to be imprisoned in the Washington Workhouse at hard labor for ninety days,

The Superintendent of the said Workhouse to pay out of any funds available, over to the wife Nellie Linaweaver, 726-10th street N. W. for support of the wife and minor child of said Otto Linaweaver, a sum equal to fifty cents for each day's hard labor performed by said Otto Linaweaver, while so confined, and being in default, him therefore safely keep in your said custody until he shall be discharged by due course of law, and for so doing this shall be your sufficient warrant.

Witness: The Hon. William H. De Lacy Judge of the Juvenile Court of the D. C. & seal of said Court this twenty fourth day of April in the year of our Lord 1909.

JOSEPH HARPER,
Clerk Juvenile Court, D. C.

5 *Stipulation for Filing Certified Copy of Information, &c.*

Filed Aug. 4, 1909.

In the Supreme Court of the District of Columbia.

Habeas Corpus. No. 488.

In the Matter of OTTO LINAWEAVER.

It is hereby, this 4th day of August, A. D. 1909, stipulated and agreed between counsel for the petitioner in the above entitled cause

and counsel for the respondent, that the certified copy of the information filed in the Juvenile Court against Otto Linaweaver for non-support of wife and child, and which was issued at the hearing of this petition for habeas corpus, be filed in this cause in the Supreme Court of the District of Columbia, and be included in the transcript of record for the Court of Appeals; and it is further agreed that the evidence presented at the trial of this cause showed that Otto Linaweaver was tried in the Juvenile Court without a jury, and that he did not waive a trial by Jury.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.
E. H. THOMAS,
Corporation Counsel for the District of Columbia.
W. A. COOMBE,
Counsel for Otto Linaweaver.

6 *Information.*

Filed Aug. 4, 1909.

In the Juvenile Court of the District of Columbia, February Term, A. D. 1909.

DISTRICT OF COLUMBIA, *ss:*

Edward H. Thomas, Esquire, Corporation Counsel in and for the District of Columbia, who, for the said United States prosecutes in this behalf, by F. H. Stephens, Esquire, his Assistant, comes here into Court, at the District aforesaid, on the eleventh day of February in the year of our Lord one thousand nine hundred and nine in this said Term, and for the said United States, gives the Court here to understand and be informed, on the oath of one Nellie Linaweaver that one Otto Linaweaver late of the District aforesaid, on the fifteenth day of January in the year of our Lord one thousand nine hundred and nine, and on divers other days and times, since said date and the date of filing this complaint, with force and arms, at the District aforesaid, and within the jurisdiction of this Court, being then and there the husband of Nellie Linaweaver and the father of one minor child Ruth Linaweaver under the age of sixteen years, to wit: ten months, did, without just cause, willfully neglect to provide for the support and maintenance of said wife and child, said wife and said child being in necessitous circumstances and domiciled in the District of Columbia, against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

7 Whereupon, the said Corporation Counsel, who in this behalf, prosecutes for the said United States, in manner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Otto

Linaweaver in this behalf to make him answer to the said United States touching and concerning the premises aforesaid.

EDWARD H. THOMAS,
Corporation Counsel in and for the District of Columbia,
By F. H. STEPHENS,
His Said Assistant.

Personally appeared Nellie Linaweaver before me this eleventh day of February A. D. 1909, and being duly sworn according to law doth declare and say that the facts as set forth in the foregoing information are true.

[SEAL.] (Signed) JOSEPH HARPER,
Clerk Juvenile Court of the District of Columbia.

(Endorsed:) To pay $4 w'k. Begin 2/20/09 3/10/09 90 ess to pay $4 3/10/09 & $4 ea- Sat. thereafter. 4/24/09 Committed to W. H. under original sentence of March 10-1909 in default of bond in sum of $150. Filed Feb'y 11-1909. Joseph Harper, Clerk Juvenile Ct. D. C.

8 *Order for Release of Petitioner on Bail.*

Filed May 4, 1909.

In the Supreme Court of the District of Columbia.

Habeas Corpus. No. 488.

In the Matter of OTTO LINAWEAVER.

On consideration of the motion that Otto Linaweaver be released on bail, it is this fourth day of May, A. D. 1909,

Ordered: That recognizance be taken in the sum of one hundred dollars, without surety, for the said Otto Linaweaver, pending the determination of this cause.

HARRY M. CLABAUGH,
Chief Justice.

Order Discharging Petitioner from Custody.

Filed Jul- 31, 1909.

In the Supreme Court of the District of Columbia.

Habeas Corpus. No. 488.

In the Matter of OTTO LINAWEAVER.

Upon consideration of the petition of habeas corpus filed herein, the return of Lewis D. Zinkham, Superintendent of the Workhouse of the District of Columbia, and it appearing from the record of

proceedings in the Juvenile Court and the evidence presented in the present case that the said Otto Linaweaver was charged by information in the Juvenile Court with having, without just cause,
9 deserted, and wilfully neglected and refused to provide for the support and maintenance of, his wife, in destitute and necessitous circumstances, and also with having, without just excuse, deserted, and wilfully neglected and refused to provide for the support and maintenance of his minor child under the age of sixteen years, to wit, of the age of one year, in destitute and necessitous circumstances; and that on March 10, 1909, said Otto Linaweaver was tried and convicted of the offense charged in said information and sentenced to be imprisoned in the workhouse for ninety days at hard labor, the fifty cents per day earned while confined to be paid to Nellie Linaweaver, and further that sentence was suspended on said March 10, 1909, on condition that the defendant pay to Nellie Linaweaver four dollars on March 10, 1909, and four dollars each Saturday thereafter, and that on April 24, 1909, said Otto Linaweaver was adjudged in default and committed under the original sentence of March 10, 1909, to the workhouse in default of bond in the sum of one hundred and fifty dollars, and that the warrant of commitment under which the aforesaid Lewis F. Zinkham so held the said Otto Linaweaver is in accordance with and by virtue of this order of the Juvenile Court of April 24, 1909; and after arguments by counsel, it is this 30th day of July A. D. 1909,

Adjudged, ordered and decreed: That the said Otto Linaweaver be, and he is hereby, discharged from the custody of the said Lewis F. Zinkham, Superintendent of the Workhouse for the District of Columbia, and that the sentence and the order of commitment of the Juvenile Court in this case be, and it is hereby, declared null and void.

10 Whereupon the attorneys for Lewis F. Zinkham, Superin-
*in*tendent of the Workhouse of the District of Columbia, note an appeal to the Court of Appeals of the District of Columbia.

HARRY M. CLABAUGH,
Chief Justice.

I consent.
W. A. COOMBE,
Att'y for Otto Linaweaver.

11 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Aug. 4, 1909.

In the Supreme Court of the District of Columbia.

Habeas Corpus. No. 488.

In the Matter of OTTO LINAWEAVER.

The Clerk will please prepare record for the Court of Appeals in the appeal in the above entitled cause, as follows:

1. Petition for habeas corpus.

2. Return of Lewis D. Zinkham, Superintendent of the Workhouse for the District of Columbia.

3. Copy of information filed in Juvenile Court.
4. Stipulation of August 4, 1909.
5. Order of May 4, 1909, directing that Otto Linaweaver be released on his personal recognizance.
6. Order granting petition and discharging Otto Linaweaver.
7. This designation of record.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.
E. H. THOMAS,
Corporation Counsel for the District of Columbia.

I consent.

W. A. COOMBE,
Attorney for Otto Linaweaver.

12 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 11 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, In Re: Otto Linaweaver, No. 488 Habeas Corpus, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of September A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover. District of Columbia Supreme Court. No. 2062. Louis F. Zinkham, &c., appellant, vs. Otto Linaweaver. Court of Appeals, District of Columbia. Filed Sep. 15, 1909. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, A. D. 1909.

No. 2062.

No. 10, SPECIAL CALENDAR.

LOUIS F. ZINKHAM, SUPERINTENDENT OF THE WORKHOUSE FOR THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

OTTO LINAWEAVER, APPELLEE.

BRIEF FOR APPELLANT.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.
EDWARD H. THOMAS,
Corporation Counsel.
F. SPRIGG PERRY,
Assistant United States Attorney, District of Columbia.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, A. D. 1909.

No. 2062.

No. 10, SPECIAL CALENDAR.

LOUIS F. ZINKHAM, SUPERINTENDENT OF THE WORKHOUSE FOR THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

OTTO LINAWEAVER, APPELLEE.

STATEMENT OF CASE.

This is an appeal from an order of the Supreme Court of the District of Columbia discharging one Otto Linaweaver upon a writ of *habeas corpus*. Linaweaver at the time of his release was confined in the workhouse under a sentence of the Juvenile Court.

On February 11, 1909, information was filed in the Juvenile Court against Otto Linaweaver. This information charged the said Linaweaver with having wilfully neglected, without just cause, to provide for the support and maintenance of his wife and child, the child being of the age of ten months.

On March 10, 1909, the said Linaweaver was tried and convicted of the offense charged in the information and sentenced to be imprisoned in the workhouse for ninety days at hard labor, the fifty cents per day earned while confined to be paid to his wife and child.

On the same day the sentence was suspended on condition that the defendant pay to his wife four dollars each week. For some weeks the said Linaweaver paid regularly the amount ordered by the Juvenile Court until the week of April 19, 1909, when he failed to make the payment.

On April 24, 1909, Linaweaver was adjudged in default by the Juvenile Court, and committed under the original sentence of March 10, 1909, to the workhouse in default of bond in the sum of one hundred and fifty dollars.

A writ of *habeas corpus* was filed in the Supreme Court of the District of Columbia on April 27, 1909, in which it was alleged that the said Linaweaver was held in the workhouse without due process of law, and that the warrant of commitment from the Juvenile Court was null and void. The case was heard and considered before Chief Justice Clabaugh, of the Supreme Court of the District of Columbia, and on May 4, 1909, personal bond of Linaweaver was taken, pending the determination of the case, and Linaweaver was released.

On July 31, 1909, there was filed an order of the Chief Justice, in which it was held that the sentence and the order of commitment of the Juvenile Court in this case were null and void, and the said Linaweaver was discharged from the custody of the superintendent of the workhouse.

From this order an appeal was taken to this court.

Assignment of Errors.

1. The Supreme Court of the District of Columbia erred in decreeing that the sentence and order of commitment of the Juvenile Court in this case were null and void.

2. The Supreme Court of the District of Columbia erred in discharging Otto Linaweaver from the custody of Louis F. Zinkham, superintendent of the workhouse for the District of Columbia.

First and Second Assignments of Error.

The principal point involved in the present case, and the ground upon which the Chief Justice acted when he signed the order discharging Linaweaver from the custody of the superintendent of the workhouse, is that the Juvenile Court has no jurisdiction over the offenses provided for in the act of March 23, 1906.

As we have fully considered the act of March 19 and the act of March 23, 1906, in the case of United States *vs.* Leo S. West, No. 2044, No. 6, special calendar, for this term, we will not repeat the argument there used. We contend, as therein stated, that the act creating the Juvenile Court is *in pari materia* with the act of March 23, 1906, and that the Juvenile Court has jurisdiction over the offenses provided for in this latter act.

Right to Trial by Jury.

Counsel for Otto Linaweaver in the argument upon the petition for the writ of *habeas corpus* before the Chief Justice and, in fact, in the petition for the writ, stated an additional ground for asking that Linaweaver be discharged. This ground is found in section 8 of the petition for the writ of *habeas corpus*, and the contention is that the commitment of the Juvenile Court was null and void, as the proceedings of the Juvenile Court were unconstitutional, and deprived the petitioner of his liberty without due process of law. In the stipulation of counsel, which appears in the record, it was agreed that the evidence presented at the trial of the case before the Chief Justice showed that Linaweaver was tried in the Juvenile Court without a jury, and that he did

not waive a trial by jury. The section of the Juvenile Court act of March 19, 1906, providing for the manner of procedure in the Juvenile Court, is in almost identical terms with the similar provisions granting jurisdiction to the Police Court. It is found in section 12:

> "SEC. 12. That prosecutions in the Juvenile Court shall be on information by the corporation counsel or his assistant. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury unless the accused shall in open court expressly waive such trial by jury, and request to be tried by the judge, in which case the trial shall be by such judge and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury. In all cases where the accused would not under the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be fifty dollars or more, or imprisonment as punishment for the offense may be thirty days or more, the accused shall demand a trial by jury, in which case the trial shall be by jury. In all cases where such court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year."

A provision in the District of Columbia Code providing for jury trials in the Police Court is found in section 44, District of Columbia Code. There are two parts to this section applicable to the present case. In the first place, where under the Constitution of the United States the accused would be entitled to a jury trial, the trial shall be by a jury, unless there be an *express waiver* by the accused of such a trial by jury and a *request to be tried by the judge.* Where under the Constitution of the United States the accused would not be entitled to a trial by jury, the trial shall

be by the court without a jury, except where the fine may be fifty dollars or more or imprisonment more than thirty days, and the accused shall *demand a trial by jury.*

In the first place, we contend that the writ of *habeas corpus* cannot be made to perform the office of a writ of error, and that the judgment of a court of competent jurisdiction must contain errors or defects apparent upon its face before that judgment will be considered void on a writ of *habeas corpus.* The question of errors and defects in the *procedure* upon which a conviction is founded will not be entertained in a collateral proceeding by *habeas corpus.*

In the case of United States *vs.* Davis, 18 Appeals D. C., 280, there was a proceeding in *habeas corpus* instituted in the Supreme Court of the District of Columbia and an appeal to the Court of Appeals. The ground upon which the writ of *habeas corpus* was predicated in the lower court and upon which that lower court acted in discharging the petitioner was that the information did not allege that there was a separate and independent affidavit made by the prosecuting witness or some other person possessing knowledge of the facts upon which the information was founded. It was contended that without this separate affidavit there was not such an information as is required under section 1064 of the Revised Statutes of the District of Columbia, and that the proceeding was in violation of the Fourth Amendment to the Constitution of the United States. But the Court of Appeals reversed the lower court, and held that the validity of the information in the Police Court depended upon a question of procedure, and that the regularity of this question of procedure could not be raised upon a writ of *habeas corpus.*

So, too, in the Linaweaver case, now under consideration, the regularity of the judgment and commitment upon its face is not questioned, so far as the question of a jury trial is concerned. The only question involved is whether or not the court proceeded properly in trying the defendant without a

jury when there was no express waiver of a jury. This is solely a question of procedure, and falls directly within the case of United States *vs.* Davis, *supra,* and the authorities there cited.

We contend, also, that even were this a proper subject to be considered upon a writ of *habeas corpus,* the case against Linaweaver did not fall within any provision of section 12 of the act creating the Juvenile Court which should entitle him to a trial by jury without an express waiver of such jury trial.

A case involving this point is that of Bowles *vs.* D. C., 22 Appeals D. C., 321. This was a case in which the Police Court of the District of Columbia had proceeded under section 44 of the Code, and a defendant was tried before a judge of the Police Court without a jury. It was contended in that case that Bowles was entitled to a jury trial under the Constitution of the United States, and that the action of the judge in trying him without a jury was unconstitutional and the commitment and fine thereon were null and void. This case came up to the Court of Appeals on a writ of error, so that all the points involved were distinctly brought before this court. The court refused to sustain the contention of the appellant, and held that the appellant was not entitled as a matter of right to a trial by jury where he was charged in the Police Court on an information for fast driving. With reference to the argument that the offense was one which was triable under the Constitution by jury, the court says:

> "But this argument is more plausible than substantial. It is an argument that has been repeated ever since the Constitution of the United States went into force. There is not and there never was any such criminal offense known to the common law as that of fast driving, even on the streets of a great city. The offense that was known to the common law was that of fast driving in such manner and under such circumstances as to endanger the lives of the inhabitants. Fast driving of itself was never an offense at common law."

And further in the same opinion, with reference to this offense:

> "The right of a municipality under legislative authority or by immemorial usage, to prohibit certain actions as offenses against it, is undoubted and beyond question. Such acts so prohibited become offenses; but they are not the criminal offenses to which the Constitution of the United States extends the privilege of trial by jury, and they can in no proper sense be regarded as creating a purely civil liability. It must be held that violations of the police regulations of municipalities, made for the preservation of good order, are criminal offenses, and punishable as such, although in their nature of a petty class, not cognizable in the tribunals of the common law."
>
> Bowles *vs.* D. C., 22 App. D. C., 321.

An exhaustive review of the reasons and authorities in support of the contention of the United States is found in the case of State *vs.* Glenn, 54 Maryland, 572. In that case there was brought into question on appeal the action of the justice of the peace, sitting as a police justice, in the city of Baltimore, in which a party was charged with being habitually a disorderly person, leading a dissolute and disorderly course of life. Glenn was convicted before the justice of the peace, and applied for his writ of *habeas corpus*, and was discharged upon the ground that the jurisdiction of the justice of the peace as given under the law covering the case was unconstitutional. On appeal, in the course of the opinion in the case (page 605) the court says:

> "And when it is declared that a party is entitled to a speedy trial by an impartial jury, that must be understood as referring to such crimes and accusations as have, by the regular course of law and the established mode of procedure, been the subjects of jury trial. It could never have been intended to embrace there all species of accusation involving either criminal or penal consequences. If that were the construction, then all cases of contempt, instead of being

the subjects of a summary jurisdiction, as they have always been treated, could only be tried by jury. The design manifestly of the provisions of the 'Declaration of Rights,' to which we have referred, was simply to declare and make firm the pre-existing rights of the people as those rights had been established by usage and the settled course of law. If all cases of a penal or criminal nature, where conviction might involve as a consequence, either directly or alternatively the imprisonment of the party, must be tried upon indictment and by jury, how is the police power in the hands of the various municipal corporations to be enforced? If the State is not permitted to provide by law for the summary trial and conviction of vagrant and disorderly persons by justices of the peace, it would clearly follow that no such power could be granted to be exercised under charters and ordinances of municipal corporations; and the consequence would be that, for the violation of all mere police ordinances, prescribing penalties for their infraction, it would be the right of the party accused to insist upon indictment and trial by jury. Such a mode of proceeding, if it were practicable, has never been contended for; nor could such contention be maintained for a moment."

State *vs.* Glenn, 54 Md., 572.

And the court thereupon held that the act of the legislature conferring jurisdiction upon justices of the peace to try, convict, and commit to the house of correction vagrant and habitually disorderly persons was constitutional.

This question of jurisdiction of the Police Court of the District of Columbia was considered in the case of Callan *vs.* Wilson, 127 U. S., 540. The Police Court in this case had sentenced a person under an information accusing him of a conspiracy to prevent another person from pursuing a lawful avocation. The Supreme Court of the United States held that the defendant was entitled to a trial by jury under the Constitution of the United States. The court said that in certain cases where there were involved only petty offenses,

there could be a trial in the Police Court by the judge alone, without a jury, and that such a trial would not violate the Constitution of the United States, but that the case before them was not of this character. In the course of their opinion, reversing the lower court and discharging the prisoner, the court says:

> "According to many adjudged cases arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily and without a jury; and in respect to other offenses the constitutional requirement is satisfied if the right to the trial by jury in an appellate court is accorded to the accused" * * * (p. 552).

On page 555:

> "Without reference to the authorities, and conceding that there is a class of petty or minor offenses not usually embraced in public criminal statutes and not of a class or grade triable at common law by a jury, and which if committed in this District may under the authority of Congress be tried by the court and without a jury, we are of opinion that the offense with which the appellant is charged does not belong to that class. A conspiracy such as is charged against him and his codefendants is by no means a petty or trivial offense."
>
> Callan *vs.* Wilson, 127 U. S., 540, 552, 555.

From the consideration of these cases, and many others in the text books, relative to this subject, it appears that under the Constitution of the United States the accused would be entitled to a trial by jury in all cases in which there is not involved a pretty or minor offense, such as the violation of municipal ordinances and the like. Where there are involved petty offenses, and offenses of a minor character, the right to trial by jury is not conferred by the Constitution of

the United States. The act of March 23, 1906, making it an offense for one to fail to support his wife and minor children does not provide for an offense which was known to the common law, and is not such an offense as would entitle the accused under the Constitution to the right of trial by jury. It is a petty offense, and falls within the class of offenses under which are embraced disorderly persons, habitual drunkards, and the like.

This is very plainly set out in the case of State *vs.* McLorinan, 43 N. J. L., 411. The State of New Jersey had passed a law concerning disorderly persons, and under one of the sections of this act it was provided that the desertion of a wife or family should constitute a person a disorderly person within the meaning of the act. While a jury trial was demanded and granted in this case, the court distinctly holds that this class of cases is not one in which there must be a jury trial. In reciting the proper procedure under this law, the court says:

> "Any justice of the peace on receiving such a complaint is required to issue a warrant for the apprehension of the person complained of. Upon his apprehension, a day for the investigation of the complaint is to be fixed. On that day the complaint is to be investigated and the justice—*or a jury, if one is demanded*—is to determine whether the person complained of is guilty or not guilty."

The direct point in issue was determined in the case of State *vs.* Larger, 45 Missouri, 510; in that case there was a statute which provided that a husband who shall, without just cause, abandon his wife or fail to maintain and provide for her shall be deemed guilty of a misdemeanor. On appeal it was objected that the judgment of the lower court was erroneous because the trial was by the court, the record failing to show that a jury was waived. In misdemeanor cases

the statute did not require any express waiver of a jury in order to authorize the trial by the court; and the court held:

> "It is not to be presumed, therefore, in the silence of the record, that the court proceeded irregularly and without authority. If the defendant was not willing to be tried by the court he should have objected at the time. Having taken his chances with the court, it is too late now to object that he was not tried by a jury."
>
> State *vs.* Larger, 45 Missouri, 510.

In the case of Brewster *vs.* People, 183 Illinois, 143, the defendant was tried on a misdemeanor which was punishable by a five-hundred-dollar fine or by imprisonment not exceeding one year. The court held that the trial by jury could be waived.

In the case of Lancaster *vs.* State, 90 Maryland, 211, the court held that the trial by jury could be waived in a case of an assault and battery.

Similarly in Lavery *vs.* Commonwealth, 101 Penna. State, 560.

In the case of State *vs.* Wells, 69 Kansas, 792, the court held that the trial by jury could be waived upon charge against the defendant of selling intoxicating liquors.

Where the defendant was charged with the sale of butter unlawfully colored, it was held in State *vs.* Bockstruck, 136 Missouri, 335, that he could waive a jury trial.

In the case of Otto *vs.* State (Texas Criminal Appeals, 1905), 87 S. W. Rep., 698, it was held that the jury trial could be waived where a defendant was charged with violating the local-option law.

Upon the authorities above quoted, we contend that it was not necessary for the defendant expressly to waive a jury trial, but that under the law he could be tried by the judge without such an express waiver.

Under these assignments of error, the United States con-

tends for such an interpretation of the law as will best preserve the interests of the people of the District of Columbia and protect that family relation which forms the basis of our modern social system, and we submit that the judgment should be reversed and the petition ordered dismissed.

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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1909.

Habeas Corpus, No. 488.

LOUIS F. ZINKHAM, SUPERINTENDENT OF THE WORKHOUSE FOR THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

OTTO LINAWEAVER, APPELLEE.

BRIEF OF APPELLEE.

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Statement of Case.

This is an appeal by the appellant from an order of the Supreme Court of the District of Columbia, granting the prayers of a petition on which a writ of habeas corpus issued, the same being number 488.

At the March term, 1909, of the Juvenile Court an information was filed against the appellee by the corporation counsel of the District charging with proper allegations of time and place that the appellee being the husband of Nellie Linaweaver and the father of Ruth Linaweaver, did without just cause wilfully neglect to provide for their support and maintenance, she and said child being in necessitous circumstances and domiciled

in the District. On March 10, 1909, the appellee was arraigned, pleaded "not guilty," "did not waive a jury trial," was tried by the court and adjudged guilty, and sentenced to be imprisoned at hard labor in the workhouse for three months, the fine if paid to go to the wife; the execution of sentence was suspended on condition that appellee pay $4 per week for the space of one year for the support of his wife and child, beginning March 10, 1909. That the said amount was paid every week thereafter until the appellee lost his position; that upon advice of counsel before the weekly instalment became due appellee went to said court and interviewed the justice of said court; that he was put in custody of a marshal by order of said court without any information being filed under oath and sent to workhouse, on the ground that appellee had broken the condition under which sentence was suspended. That the commitment and information from the Juvenile Court was based upon the act passed by Congress March 23, 1906, making it a misdemeanor for a husband and father to wilfully neglect to support and maintain his wife and minor children.

ARGUMENT.

The main question is whether appellee's contention is correct in the allegation that the Juvenile Court was and is without jurisdiction in the premises. The Juvenile Court was created by act of Congress, March 19, 1906, the eighth section of which act defines the jurisdiction of the court. Nowhere in said act is jurisdiction conferred upon the Juvenile Court to adjudge as to rights and duties between husband and wife. It gives jurisdiction of certain offenses which parents and guardian owe to their children and wards. As to other matters the jurisdiction is conferred by reference to specific acts of legislation,

and when these are examined it will be found that none of them confer any jurisdiction to deal with the relation of husband and wife.

The offense with which the appellee was charged in the Juvenile Court was created by act of March 23, 1906, four days later than the act creating the Juvenile Court. It contains no reference whatever to that court. The commitment and information was based upon this act. Even if there be a child the court assuming jurisdiction over the husband would make this order a mere nullity, evidence could be shown that the child was not in necessitous circumstances or the order could have been based upon the evidence that the wife was in necessitous circumstances, which would make the order upon that evidence alone a nullity.

It has been argued in the court below that this jurisdiction was and is conferred upon the Juvenile Court by implication or intendment.

The following cases support the argument of counsel for appellee. Acts creating courts of limited jurisdiction are construed strictly, and the powers of such courts will not be extended by implication further than is necessary for the exercise of the jurisdiction expressly conferred upon them.

23 Amer. & Eng. Enc. (1st Ed.), 406.
Thompson *vs.* Cox, 8 Jones (N. Car.), 311.
Pringle *vs.* Carter, 1 Hill (S. C.), 53.
School Inspectors *vs.* Peoples, 20 Ill., 525.
Steamboat Delta *vs.* Walker, 24 Ill., 233.
Wakefield *vs.* State, 5 Ind., 195.
Matlock *vs.* Strange, 8 Ind., 57.
Obrien *vs.* State, 12 Ind., 369.
Martin *vs.* Fales, 10 Me., 23.
36 Am. Dec., 693.
Call *vs.* Mitchell, 39 Me., 465.

State *vs.* Metzger, 26 Mo., 65.
Williams *vs.* Bower, 26 Mo., 601.
State *vs.* Anderson, 2 Overt (Tenn.), 62.
5 Am. Dec., 648.
Walker *vs.* Wynne, 3 (Tenn.), 62.
Vanbibee *vs.* Vanbibee, 10 Hamp. (Tenn.), 53.
Caulfield *vs.* Stevens, 28 Cal., 118.
East Union Dp. *vs.* Ryan, 86 Pa. St., 459.
Diss Urban Sanitary Authority *vs.* Aldrich, 2 I. B. Div., 297.
Hartley *vs.* Hooker, 2 Cowp., 523.
Montrial *vs.* Stevens, 3 App. Coo., 605.

In Hartley *vs.* Hooker, 2 Cowp., 533: Lord Mansfield said: If a new offense is created by statute and a special jurisdiction out of the course of the common law is prescribed, it must be followed. If not strictly pursued all is a nullity and *Coram non judice*, and objections may be taken in any stage of the cause.

Where a limited jurisdiction is given by statute the act should be construed strictly as to the extent of the jurisdiction and liberally as to the mode of proceeding.

Barrell *vs.* Chitwood, 2 Bibb. (Ky.), 431.
Russell *vs.* Wheeler, 1 Hemkt. (U. S.), 3.

The next question is whether a writ of habeas corpus is the proper procedure, that question having been raised in the lower court. A person who is in custody by virtue of any judgment or order of court may be discharged therefrom on habeas corpus in any case where, whether it was one of general or limited jurisdiction, did not for any reason have jurisdiction of the person of the defendant, or of the subject-matter involved, civil or criminal, so that the judgment would be held void on collateral attack, or if the process under which the party is in custody is void for any reason; but in criminal cases the

mere fact that the mittimus is defective is not a ground for discharge, if it appears from the judgment or sentence that the imprisonment is legal, and a valid amended mittimus received by the officer who has the prisoner in custody after the writ was issued renders the imprisonment valid.

15 Amer & Eng. Enc. (2nd Ed.), 167.
In re Bomer, 151 U. S., 242.
In re Sweeney, 150 U. S., 637.
Neilson, petitioner, 131 U. S., 176.
Ex p. Neilson, 114 U. S., 417.
Ex p. Yarbrough, 110 U. S., 651.
Ex p. Rowland, 104 U. S., 604.
Ex p. Virginia, 100 U. S., 339.
Ex p. Siebold, 100 U. S., 371.
Ex p. Yerger, 8 Wall. (U. S.), 85.
Ex p. Lange, 18 Wall. (U. S.), 163.
U. S. *vs.* Patterson, 29 Fed. Rep., 590.
In re Christian, 82 Fed. Rep., 199.

The last question which was raised in the lower courts is whether or not the appellee was entitled to a jury trial, he not having waived that right.

It is often a matter of great difficulty to decide whether a particular offense is or is not such a petty offense as is not within a constitutional provision securing the rights to trial by jury. On the ground that the keeping of a house of ill fame was an indictable offense by the common law, a person accused of the offense is entitled to a trial by jury. And it has been held that the right of trial by jury is secured to a defendant in a prosecution for receiving stolen property, for the offense of gaming, and for petit larceny, assault and battery.

27 Amer. & Eng. Enc. (2 Ed.), 374, citing:
See 1 Stephens History Cr. Law, c. 4, P., giving the

history and character of the English legislation relating to petty offenses.

See also Byers *vs.* Com., 42 Pa. St., 89, and the title "Petit misdemeanor," Amer. & Eng. Enc. (2nd Ed.), 22, p. 760.

Keeping houses of ill fame:

Slaughter *vs.* People, 2 Dougl. (Mich.), 334, note.
Warren *vs.* People (Supm. Ct. Gen. T.), 3 Pork Grim (N. Y.), 45.
Miller *vs.* Com., 88 Va., 618.

Gaming:

U. S. *vs.* Herzog, Wash. L. Rep., 299.

Petit Larceny:

In re Fauldan, 20 Wash. L. Rep., 302.
Damer *vs.* State, 89 Md., 220.

Assault and battery:

In re Robinson, D. C., 570.

As to jury trial in D. C., see U. S. *vs.* Callan, 127 U. S., 540.

The offense charged in the information is one which can be and is punished by a fine of more than $50, an imprisonment for more than thirty days; therefore the appellee had a right to a trial by jury, and such was not waived by him, the contention of counsel for the appellant is that the offense is a breach of municipal ordinance, and does not come within the meaning of the act.

7 Amendments to Constitution.

The act of Congress gives the court authority to impose an alternative punishment, and one is just as much a punishment as another; and it seems to be unreasonable

to say to a person that you can be placed in jail without a jury trial for any period not to exceed a year, not because you have committed any offense, but because you are unable to pay your fine. The question of this alternative sentence and the effect thereof were fully considered in the case of United States *vs.* Mills, 11 App. D. C., page 500, where the court held that the alternative sentence was punishment for the crime.

The act of Congress is utterly null and void and of no effect in that it fails to define the offenses which are triable by jury, and it is unconstitutional, null, and void when it attempts to give a court a right to try a case arbitrarily where there would be inflicted on the defendant a sentence of any period up to one year; that where the offense is of such dignity that the Constitution gives to the party charged a right to be tried by jury.

Act VII Am. to Constitution.
Parsons *vs.* Bedford, 3 Pet., 374

Respectfully submitted.

W. A. COOMBE.